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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
CITY OF LONGVIEW,)
Appellant,)
v)
SOUTHWEST AIR POLLUTION)
CONTROL AUTHORITY,)
Respondent.)

PCHB No. 77-103

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of respondent's Order dismissing a request for variance from a provision of the Washington Clean Air Act (chapter 70.94 RCW), came before the Pollution Control Hearings Board, Dave J. Mooney and Chris Smith, at a formal hearing in Vancouver, Washington on January 20, 1978.

Appellant was represented by its attorney, W. R. Studley; respondent was represented by its attorney, James D. Ladley, and by its Executive Director, Edward K. Taylor. David Akana presided.

The agreed record in this matter includes appellant's Statement

1 of Contentions and four exhibits, appellant's Pre-Hearing Brief,
2 respondent's Statement of Contentions and seven exhibits, and respondent's
3 Pre-Hearing Brief.

4 Having considered the record, having heard arguments from counsel,
5 and being fully advised, the Pollution Control Hearings Board makes these

6 FINDINGS OF FACT

7 I

8 Pursuant to RCW 43.21B.260, respondent has filed with the Board a
9 certified copy of its Regulation I which is noticed.

10 II

11 Respondent was activated in 1968, and has remained such at all
12 relevant times herein, and has jurisdiction in all areas within Clark,
13 Cowlitz, Lewis, Skamania, and Wahkiakum Counties. Appellant, City of
14 Longview, is located in Cowlitz County.

15 III

16 Appellant applied for a variance from respondent to conduct open
17 burning of natural land clearing debris which had been removed from
18 certain of its properties during the creation of the Columbia Industrial
19 Park.

20 IV

21 On June 28, 1977 respondent found, without holding a hearing, that
22 (1) it did not have authority to hear appellant's variance request from
23 the Washington Clean Air Act (chapter 70.94 RCW); (2) both state and
24 federal ambient air standards were exceeded in Longview; (3) Longview
25 has been designated a "nonattainment" area that exceeds or threatens to
26 exceed state and federal ambient air standards and state ambient air

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1 quality goals for particulates; (4) RCW 70.94.775 prohibits outdoor
2 fires within the City of Longview "due to the measured air quality and
3 the designation of Longview as a nonattainment area." Appellant's
4 request for a variance was dismissed resulting in the instant appeal.

5 V

6 Air sampling conducted in Longview shows that suspended
7 particulate concentrations exceeded 150 micrograms per cubic meter of
8 air on four occasions in 1977 and on ten occasions in 1976. Such
9 sampling also demonstrated that suspended particulate concentrations
10 exceeded 30 micrograms per cubic meter of air for more than 50 percent
11 of samples collected in any calendar year. The primary air mass station
12 at 706 - 30th Avenue in Longview registered an annual geometric mean
3 of 68 micrograms per cubic meter of air in 1976.

14 VI

15 Neither the State Department of Ecology nor respondent has
16 designated, by rule making, Longview as an area exceeding or threatening
17 to exceed state or federal ambient air quality standards, or state
18 ambient air quality goals for particulates.

19 VII

20 Any Conclusion of Law which should be deemed a Finding of Fact is
21 hereby adopted as such.

22 From these Findings the Board enters these

23 CONCLUSIONS OF LAW

24 I

25 RCW 70.94.181 provides that a "Board [herein respondent] may grant
26 such variance, but only after public hearing or due notice" it makes

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1 certain findings.

2 Section 2.07 of respondent's Regulation I provides that "(t)he
3 hearing held hereunder shall be conducted in accordance with the rules
4 of evidence as set forth in RCW 34.04.100 The Board may grant
5 such variance, but only after public hearing on due notice and in
6 conformity with RCW 70.94.181"

7 RCW 70.94.181(7) provides that "An application for a variance . . .
8 shall be approved or disapproved . . . within sixty-five days"

9 In the instant matter, the material facts upon which respondent has
10 made its decision are not in dispute. Respondent has determined at the
11 outset that it lacks jurisdiction to hear and grant appellant's request
12 for a variance. Such determination is reviewable de novo by this Board.

13 II

14 Respondent contends that RCW 70.94.181 does not permit a
15 variance from the requirements of RCW 70.94.775(3). The latter
16 provision provides in part that:

17 No person shall cause or allow any outdoor fire:

18 (3) In any area which has been designated by the department of
19 ecology or board of an activated authority as an area exceeding
20 or threatening to exceed state or federal ambient air quality
21 standards, or after July 1, 1976, state ambient air quality
goals for particulates, except instructional fires permitted by
RCW 70.94.650(2). (Emphasis added.)

22 No outdoor fires are allowed in a "designated" area that exceed or
23 threaten to exceed ambient air quality "standards" and "goals" which
24 are set by state or federal agencies. These standards or goals are
25 not subject to a variance under RCW 70.94.181, which provision applies

1 only to "rules or regulations governing the quality, nature, duration
2 or extend of discharges of air contaminants." Nowhere is a variance
3 permitted from the ambient air quality standards or goals. Further,
4 either the Department of Ecology or respondent may make a designation.
5 The fact that respondent has jurisdiction in its several counties would
6 not preclude the Department from designating "nonattainment" areas
7 therein nor preclude respondent from enforcement action with respect to
8 such designation. RCW 70.94.775; 70.94.785. Respondent's denial of
9 appellant's variance application was proper. However, the variance
10 sought is not necessary inasmuch as RCW 70.94.775(3) does not now prohibit
11 the proposed outdoor fire, at least until rules are adopted designating the
12 Longview area as a "nonattainment" area as is hereafter discussed.

3 III

14 WAC 18-40-030 provides in part:

15 AIR QUALITY STANDARD. Suspended particulate in the
16 ambient air shall not exceed the standards enumerated below
at the conditions stated.

17 (1) The suspended particulate concentration measured
at any primary air mass station shall not exceed:

18 (a) Sixty micrograms per cubic meter of air as an
annual geometric mean.

19 (b) 150 micrograms per cubic meter of air - maximum
24-hour concentration not to be exceeded more than once
per year.

20

21 WAC 18-40-040 provides:

22 AIR QUALITY OBJECTIVE. In recognition of the need for
23 continuing improvement of the quality of the air resource,
it is the intent of the department of ecology to work
24 toward achievement of the following objective for suspended
particulate: Concentrations measured at primary air mass
25 stations shall not exceed thirty micrograms per cubic
meter of air for more than fifty percent of the samples
collected in any calendar year.

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1 The standards of WAC 18-40-030(1) and the objective of WAC 18-40-040
2 have been and are presently being exceeded in the Longview area.
3 Respondent contends that the nonattainment of ambient air standards or
4 goals need only be shown in fact, or by an administrative order such
5 as that presently on appeal. While there is force to this argument,
6 we conclude that designation of "an area exceeding or threatening to
7 exceed" ambient air quality standards or goals should be accomplished
8 by rules rather than on a case by case basis. A reading of the
9 companion statutory provision supports this result. RCW 70.94.775(2)
10 prohibits outdoor fires during a forecast, alert, warning or emergency
11 condition as defined in RCW 70.94.715. The latter statute provides
12 in part that:

13
14 The episode avoidance plan, which shall be established by
15 regulation in accordance with chapter 34.04 RCW, shall
16 include, but not be limited to the following:

17 (1) The designation of episode criteria and stages, the
18 occurrence of which will require the carrying out of pre-
19 planned episode avoidance procedures. The stages of
20 occurrence shall be (a) forecast, (b) alert, (c) warning,
21 (d) emergency, and such intermediate stages as the department
22 shall designate. . . . (Emphasis added.)

23 It is contemplated that regulations would establish an episode avoidance
24 plan rather than declare an episode by statutory interpretation on a
25 case by case basis.

26 Requiring a designation by regulation is also supported by the
27 rules promulgated by the Department of Ecology in WAC 173-425-095
(formerly WAC 18-12-095) which provides in part that:

28 (3) The designation of any area as a "no burn" area by
29 the department shall be made by rule-making procedure and
30 only after public hearing.

1 The Department of Ecology, the responsible state agency, requires
2 designation by rule-making and such is an indication of the interpretation
3 which should be given to RCW 70.94.775(3). See Weyerhaeuser v. Depart-
4 ment of Ecology, 86 Wn.2d 310 (1976).

5 Finally, RCW 70.94.775 makes unlawful any outdoor fire in a
6 designated area and civil and criminal penalties can attach for the
7 violation of such. RCW 70.94.430; 70.94.431. Where the state did not
8 designate a drug as a controlled substance by statute or rule, the
9 Supreme Court held that there was no readily available way for a
10 person of common intelligence to determine what substances were
11 designated as controlled substances. State v. Dougall, 89 Wn.2d 118
12 (1977). See Scarsella Brothers, Inc. v. Puget Sound Air Pollution
13 Control Agency, PCHB No. 1083 (1976). In this matter, there is no
14 statute or rule designating the Longview area as a "nonattainment"
15 area. We believe that without formal designation, RCW 70.94.775(3)
16 could not be enforceable. To give effect to RCW 70.94.775(3), therefore,
17 respondent or the Department of Ecology must designate an area as
18 "exceeding or threatening to exceed state or federal ambient air quality
19 standards, or after July 1, 1976, state ambient air quality goals for
20 particulates."

21 IV

22 Respondent's denial of the variance application should be affirmed.

23 V

24 Any Finding of Fact which should be deemed a Conclusion of Law
25 is hereby adopted as such.

26 ; From these Conclusions the Board enters this

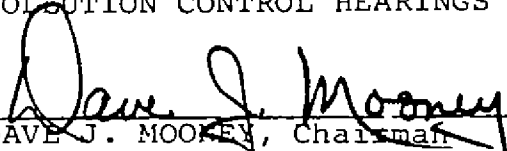
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ORDER

The denial of appellant's variance application is affirmed.

DATED this 9th day of February, 1978.

POLLUTION CONTROL HEARINGS BOARD


DAVE J. MOONEY, Chairman


CHRIS SMITH, Member